No. 21964

IN THE

United States Court of Appeals

For the Ninth Circuit

LOREN FORD and FRANCES FORD, Husband and Wife, and DAVENPORT EQUIPMENT COMPANY, INC., a Washington Corporation,

Appellants,

vs.

INTERNATIONAL HARVESTER COMPANY, a New Jersey Corporation,

Appellee.

No. 21964

Appeal from a Judgment of the United States District Court for the Eastern District of Washington Northern Division

BRIEF FOR THE APPELLANT, LOREN FORD, ET UX, ET AL.

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JURISDICTIONAL STATEMENT

Jurisdiction existed in the District Court by virtue of 28 U.S.C. § 1332(a) (1).

The Amended Complaint of Loren Ford and Frances Ford, husband and wife, and Davenport Equipment Company, Inc., a Washington Corporation, against International Harvester Company, a New Jersey Corporation alleged jurisdiction by reason of the matter in controversy exceeding the sum of $10,000.00 exclusive of interest and costs and in the controversy being between citizens of different states. (Tr. 6). The Answer of International Harvester Company admitted the aforesaid allegations (Tr. 10). In the Pre-Trial Order both parties admitted that the matter in controversy exceeded the sum of $10,000.00 and that the parties were citizens of different states (Tr. 24-25).

On April 19, 1967, Judgment was entered dismissing the action with prejudice. Timely Notice of Appeal was filed on May 17, 1967, by the Appellants.

Jurisdiction for this appeal rests on 28 U.S.C. §1291.

Throughout this brief "Tr." refers to the clerk's Transcript of Record and "R." refers to the court reporter's Record of Proceedings. The Plaintiffs and Appellants are sometimes herein referred to as "Ford." The defendant and Appellee International Harvester Company, a New Jersey Corporation, is sometimes referred to herein as "Harvester."

STATEMENT OF THE CASE

For 18 years prior to October of 1958 Loren Ford had been engaged in various capacities in the farm equipment business with experience in all phases of the farm equipment business. All of this experience was as an officer and member of the management force of International Harvester Dealerships or as an International Harvester Dealer himself. Ford's initial experience was with a large Harvester dealer in Hawaii where he worked his way up to general manager. After the War, Ford himself operated as an International Harvester dealer in Stanwood, Washington, and thereafter was General Manager of an International Harvester dealership in The Dalles, Oregon. Due to a change of ownership in The Dalles, Oregon, Harvester dealership Ford became interested in other employment. At this time he was offered a position as sales manager with the Massey Ferguson Company in Portland, Oregon, having jurisdiction over the states of Oregon, Washington, northern Idaho and western Montana, with supervision over 16 zone managers and the entire service department (R. 48).

In October of 1958 Clyde Wells was the district manager for the Spokane District of International Harvester having jurisdiction over all dealers in Eastern Washington, Northern Idaho and Western Montana. As district manager, Wells had the authority to sign dealers in the subject area and likewise to terminate dealers. (Wells' deposition, page 6). Wells previously knew Ford and regarded Ford as an experienced farm equipment dealer

with good qualifications. (Wells' deposition, pages 8-9). Included in Wells' jurisdiction were the towns of Davenport, Washington, Edwall, Washington, Harrington, Washington and Odessa, Washington.

Prior to October of 1958 the Harvester dealership in Davenport, Washington, was held by one Fred Denson doing business as Denson Hardware. The Denson operation in Davenport, Washington was not successful so far as the sale of Harvester farm equipment was concerned and Wells was interested in having someone who was more aggressive as the Harvester dealer in Davenport, Washington (Wells' deposition page 9-10).

In the early part of October of 1958, Ford and Wells had a telephone conversation concerning Harvester dealership possibilities in the Spokane district and area. Wells suggested that Ford come to Spokane to look into these possibilities. (R 48). Later in October, 1958, Ford came to Spokane, and discussed the Harvester dealership possibilities in the Inland Empire area with Wells and Howard Gabriel who was a zone manager for the Harvester company. Upon Ford's arrival in Spokane he had preliminary discussion with Wells and then was taken on a trip throughout the Spokane area by Mr. Gabriel. (R51-53). This included trips to Rosalia, Washington, Edwall, Washington, Harrington, Washington, and Davenport, Washington.

On the following day, Ford had further discussions with Wells in Spokane at which time Wells informed Ford

that if Ford purchased the Harvester dealership in Davenport, Washington, that the Harvester Company would not permit any Harvester dealership to operate in Edwall, Washington, 23 miles away from Davenport, Washington, *in competition with the dealership of Ford, so long as Ford was operating an International Harvester dealership in Davenport, Washington (Finding of Fact VI, Tr. 46).* During the same discussions Wells advised Ford that the International Harvester dealership at Harrington, Washington, was in the process of termination and that if Ford purchased the Harvester dealership in Davenport, Washington, that the Harvester Company would not permit a Harvester dealership to operate in Harrington, Washington in competition with Ford so long as Ford was operating an International Harvester dealership in Davenport, Washington. (Finding of Fact VII, Tr. 46). At the time of the agreement between Wells and Ford the Harrington dealership was on a "collect on delivery" basis and Wells informed Ford that said dealership would be shortly terminated. (Tr. 46).

Relying upon Wells' promise that Harvester would not permit a Harvester dealership to operate in Edwall, Washington, or Harrington, Washington, in competition with Ford so long as Ford was operating an International Harvester dealership in Davenport, Washington, Ford negotiated with Denson for the purchase of Denson's operation in Davenport, Washington, (R. 69), and turned down the Massey Ferguson offer. The negotiations by Ford with

Denson reached fruition in November of 1958. Ford purchased all of the assets of Denson's Hardware for $20,000.00 and in January of 1959 formed the Davenport Equipment Company, Inc., and commenced operations in Davenport as an International Harvester dealer. In purchasing the Davenport dealership Ford relied upon the promises of Wells that Harvester would not allow another Harvester dealer to operate in Edwall, Washington or Harrington, Washington in competition with Ford so long as Ford was operating a Harvester dealership in Davenport, as it was agreed by all parties that a successful Harvester dealership could not be operated in Davenport in competition with other Harvester dealers in Edwall, Washington, and Harrington, Washington. (Tr. 46). Ford's operation of the Harvester dealership in Davenport was successful until 1961.

St. John Hardware & Implement Company was the International Harvester dealer in St. John, Washington. In March of 1960 St. John Hardware & Implement Company purchased a building in Edwall, Washington and commenced doing business as a Harvester dealer in the Fall of 1960. (Tr. 47). On February 6, 1961, International Harvester Company entered into a dealership agreement with St. John Hardware & Implement Company providing for the operation by St. John Hardware & Implement Company of a Harvester dealership in Edwall, Washington. (Tr. 47). St. John Hardware was able to undersell Ford because of the volume generated by its two dealerships. Ford lost a

considerable number of sales to the new Edwall dealership and also lost service work for farmers in the Edwall area who took their work to St. John Hardware in Edwall due to the proximity thereof. (Tr. 49). Ford's sales dropped substantially after the commencement of operations in Edwall by St. John Hardware.

On January 6, 1961, Clyde Wells was replaced by Harold Berry as the district manager for the Harvester Company. Berry stated that when he replaced Wells as District Manager Berry walked in, Wells walked out, and there was no discussion between them concerning the dealerships in the Spokane District. (Berry deposition page 11.) Within a few days thereafter Ford went to the office of Berry and complained about the St. John Hardware operation in Edwall, Washington. (Tr. 48). At this time Berry informed him, Ford, he knew nothing of the promise of Wells and requested Ford to write him a letter concerning the facts and circumstances. On January 20, 1961, Ford wrote such a letter to Berry setting forth his complaints. (Defendant's Exhibit No. 123). Ford received no response to his letter. (R. 100). Thereafter Ford complained to the various zone managers concerning the operation in Edwall, Washington.

Prior to Wells' transfer, a meeting was held between Ford, W. C. Raugust, a successful Harvester dealer in Odessa, Washington, and the district manager. At this meeting both Raugust and Ford complained concerning the operation in Harrington, Washington, and likewise Ford complained concerning the operation in Edwall,

Washington. Mr. Raugust testified that the district manager did nothing but attempt to evade the issue. (R. 117). On March 15, 1961, Mr. Raugust, a long time State Senator in the State of Washington, wrote the Harvester Company a letter from Olympia, Washington. (Exhibit 131). This letter once again set forth Mr. Raugust's summary of the situation in Edwall and Harrington, Washington, and called attention to the promises made to Ford. He received no reply to this letter. (R. 118).

On December 19, 1963, Ford wrote another letter to the Harvester Company demanding termination of the operations at Edwall, Washington and Harrington, Washington. (Defendant's Exhibit No. 124). This letter was not answered by the Harvester Company. (R. 143).

In February of 1964, Ford wrote Berry, the district manager for Harvester, advising him that he had started the process of liquidating the Davenport Equipment Company due to the breach by Harvester of its agreement. On November 30, 1964, Ford wrote Berry a further letter advising that the liquidation was substantially completed and requesting cancellation of plaintiff's dealership agreements with Harvester effective December 7, 1964. (Defendant's Exhibit No. 126).

For three years immediately prior to the termination of the Ford's Harvester dealership in Davenport, Ford was unable to take any salary whatsoever from the Harvester dealership due to the competition in the Edwall area by

St. John Hardware. (Tr. 49-50). The Court found a reasonable salary to be $800.00 per month, $9,600.00 per year or a total of $28,800.00. The Court further found that a reasonable return on Ford's investment of $40,000.00 would be 6% per year which for a total of three years immediately prior to the termination amounted to $7,200.00. The Court likewise found that Ford's loss on his capital investment amounted to $3,300.00. (Finding of Fact XVI. Tr. 50).

In the trial of this action the Court found that the allegations of Ford concerning the promises made by Harvester were true and that Harvester had in fact promised Ford that it (Harvester) would not allow a Harvester dealership to operate in Edwall, Washington, in competition with Ford so long as Ford was operating an International Harvester dealership in Davenport, Washington. (Tr. 46).

The Court further found that Harvester had failed to comply with said agreement with Ford by allowing St. John Hardware & Implement Company to operate a Harvester Dealership in Edwall, Washington in competition with Ford's Harvester dealership. The Court further found that Ford had been damaged in the sum of $39,300.00 by reason of said failures during the three years immediately preceding the commencement of the action by Ford.

Ford contended that the promise by Harvester that "Harvester would not permit any International Farm equipment dealership to operate in Edwall, Washington in competition with Ford so long as Ford was operating an Inter-

national Harvester dealership in Davenport was a continuing covenant and that each day that Harvester allowed St. John Hardware to operate a dealership in Edwall in competition with Ford constituted a continuing breach of said covenant and as such the Plaintiffs could properly recover damages for the three years immediately preceding the commencement of this action. The Court held that the Washington Statute of Limitations commenced running as soon as St. John Hardware & Implement Company commenced operations in Edwall, Washington and that therefore, this action which was commenced in May of 1965 was barred by the Statute of Limitations. Ford contended that he was entitled to recover damages for three years immediately preceding the commencement of the action as the promise of Harvester was a continuing covenant and that Harvester's actions in allowing St. John Hardware to operate in Edwall in competition with Ford constituted a continuing breach of said continuing covenant. The Court entered a Judgment of Dismissal based upon the Statute of Limitations and this Appeal followed.

SPECIFICATIONS OF ERROR

The District Court erred in:

1. Failing to find that the promises made by International Harvester Company to Ford that Harvester would not permit a Harvester dealership in Edwall, Washington, or Harrington, Washington in competition with Ford so

long as Ford was operating an International dealership in Davenport, Washington constituted a continuing covenant and promise ;

2. Failing to find that Harvester's action in allowing St. John Hardware to operate in competition with Ford in Edwall, Washington, constituted a continuing breach of the aforesaid promise;

3. Failing to find that the breaches of International Harvester Company being continuing breaches, gave rise to an action for damages for the three years immediately preceding the commencement of this action;

4. In failing to conclude that the Washington Statutes of Limitations did not preclude or bar an action for damages for the continuing breaches by Harvester during the three year period immediately preceding the commencement of this action;

5. In entering Finding of Fact number XV (Tr. 49) that the Washington Statute of Limitations barred an action by Ford which was brought more than three years after the initial commencement of operations by St. John Hardware Company in Edwall, Washington;

6. Entering Conclusion of Law number VI (Tr. 51) which concluded that Ford's action was barred by the Statute of Limitations;

7. Entering judgment against Ford dismissing this action with prejudice. (Tr. 52).

ARGUMENT

The sole question presented in this Appeal is that of the Statute of Limitations.

The District Court specifically found as follows: "It was orally agreed between Mr. Ford and Mr. Wells that defendant (Harvester) would not permit any International Harvester farm equipment dealership to operate in Edwall, 23 miles away from Davenport, in competition with the plaintiffs (Ford) *so long as the plaintiffs (Ford) were operating an International Harvester Dealership in Davenport*". (Emphasis supplied). (Tr. 46). It is the contention of the Appellant, Ford, that this promise as found by the Court obligated Harvester to prevent competition by another Harvester dealer in Edwall throughout the entire term of Ford's operation of the Harvester dealership in Davenport. Likewise, it is the contention of the Appellant, Ford, that each day that Harvester permitted St. John Hardware to operate in Edwall, Washington, in competition with Ford constituted a continuing breach of Harvester's covenant with Ford. As such it is the contention of Ford that the covenant in question was a continuing covenant and that likewise that each day that the competition existed the covenant in question was breached. To hold otherwise would be to say that in the event Harvester allowed St. John Hardware to operate for one month in Edwall, then

terminated said operation for three years and then allowed St. John Hardware to resume competition with Ford would prevent the enforcement of the covenant as found by the Court. It is submitted that the important distinction is that the promise of Harvester as made by the Court was not to the effect that Harvester would not sign a contract with a dealer in Edwall, but to the contrary it was specifically found that the promise of Harvester was that it would not allow a Harvester dealer to operate in competition with Ford so long as Ford was operating an International Harvester dealership in Davenport. It is earnestly submitted that such a covenant constitutes a continuing covenant.

In 54 C.J.S. ¶ 151, p. 94, we find the following discussion concerning continuing covenants and limitations of actions:

> "The right of action for a breach of a continuing covenant accrues from day to day as long as the breach continues, and any claim for a breach back of the statutory period within which action may be brought is barred, *but the fact that a portion of the claim is barred by the Statute of Limitations will not prevent a recovery for the part which has not become barred by the time suit is filed.*" (Emphasis supplied.)

In 34 Am. Jur. ¶ 137 at p. 111 a similar rule is recognized, as follows:

> "The right of action for breach of a continuing covenant accrues from day to day as long as the failure continues, *and the fact that a portion of the claim on account of such breach is barred by the Statute of Limitations will not prevent a recovery for the part which has not become barred at the time suit is filed.*" (Emphasis supplied)

In *Bowman v. Oklahoma Natural Gas Co.*, 385 Pac. (2d) 440 at p. 447 the Court quotes from C.J.S. and Am. Jur. as hereinabove cited and states as follows:

> "The right of action for a breach of a continuing covenant accrues from day to day as long as the breach continues."

The case of *Indian Territory Illuminating Oil Company vs. Rosamond*, 120 Pac. (2d) 349, is a case similar to the instant case in that a continuing covenant and a continuing breach was involved. In said case the action was based upon an implied covenant by the lessee of an oil well to protect the well in question from drainage from surrounding wells. In an action by the lessor to recover damages for failure of the lessee to protect the well from drainage during the term of the lease, the lessee contended that the Statute of Limitations commenced to run against the action at the time of the Lessee's first failure to protect the well from drainage. The Court denied this contention and at page 352 stated as follows:

> "The implied covenant of the lease, that the lessee will protect the land from drainage by adjoining wells so long as the drilling of a protection well or wells will, in the judgment of the reasonably prudent operator, be a profitable undertaking, is a continuing covenant, the obligation resting upon the lessee during the existence of the lease or as long as his ownership thereof continues—the implied covenant being a continuous covenant, the right to maintain an action for its breach continues so long as the breach continues and plaintiff is damaged thereby—the rule is that a breach of a continuing covenant gives rise to a cause of action each

> day the breach continues, and any claim for a breach back of the statutory period within which the action may be brought is barred."
>
> "The reason for the rule is that while the repeated and successive breaches of the implied covenant continue, the right of action for subsequent breaches does not accrue upon the first breach but accrues when the statute begins to run as and when each breach occurs. Like an account not mutual in nature, but all on one side, the cause of action arises on the date of each item or breach, and the items within the statutory period of limitations do not draw after them those of longer standing."

The attention of the Court is called to the fact that in the foregoing cases we find language almost identical to the language in the promise found to have been made in the instant claim, that is, "as long as".

The general rule is that if violations are continuous, limitations never run while acts which commence the statutory period continued to occur. See *United States v. Fisher*, 112 F. Supp. 233 at p. 235. In the instant case it is submitted that the allowing of St. John Hardware to operate in Edwall, Washington, in competition with Ford constituted a continuous breach of Harvester's promise not to allow such competition so long as Ford was operating in Davenport, Washington.

The case of *Aktiebolaget Bofors v. United States*, 153 Fed. Supp. 397 is illustrative of a continuous breach situation. This action involved a contract entered into by United

States Government in 1941 whereby the inventor of the Bofors gun licensed the United States to "make, use and have made in the United States" a 40 millimeter anti-aircraft gun which the plaintiff had developed. The contract contained an agreement on the part of the United States not to export such guns and thus compete with the plaintiff's interest in selling guns or licenses to manufacture them to other countries. Beginning in 1942 the United States commenced exporting the guns and continued the exporting until shortly prior to the commencement of the action on May 15, 1953. The government contended that the cause of action was barred by the six year statute of limitations in that the contract was breached in 1942 at the time the United States commenced exporting the guns. At page 399 the Court stated as follows:

> "The agreement not to export, if we conclude that there was such an agreement, was without limit of time, and each act of violation, whenever it occurred, would constitute a violation of the agreement. There would be no way to measure, at any given time, the total damages which might result from violations then passed and those which might occur in the future and thus include them all in one suit."

As such the Court held that the action could properly be brought for damages for exports by the United States Government during the six year period immediately prior to the commencement of the action. It is submitted that the same situation exists in the instant case in that each day that Harvester allowed St. John Hardware to operate in Edwall in

competition with the plaintiff Ford, the agreement between Harvester and Ford was breached.

The Courts in the State of Washington, have, for many years last past, recognized the theory of continuing contracts and the doctrine contended for by the appellant herein. In *Austin v. Wright*, 156 Wash. 24, 286 P. 48, the plaintiff Austin brought an action based upon a written guarantee of the payment of annual dividends on certain stock "until such date as the same is redeemed by said corporation—". The action was brought more than six years after the first dividends were due but unpaid. The Court denied this contention and held that the contract was a continuing one and stated as follows:

> It is urged that the action is barred by the Statute of Limitations, but this is a continuing contract to be effective until the preferred stock should be redeemed by the corporation which issued it, and the trial court properly limited the recovery to a period of six years preceding the commencement of the action."

In the instant case it is submitted that International Harvester Company was under a continuing obligation not to permit a Harvester dealer to operate in Edwall, Washington, in competition with the Plaintiff, "so long as Plaintiff were operating an International Harvester dealership in Davenport." Such an agreement would clearly seem to be a continuing agreement which obligated Harvester to refrain from allowing a Harvester dealer to compete in Edwall, Washington, at any time during the plaintiff Ford's operation of the dealership in Davenport, Washington.

The doctrine of a continuing covenant was likewise recognized by the Washington State Supreme Court in *Reuter Organ Company v. First Methodist Episcopal Church,* 7 Wn. (2d) 310, 109 P. (2d) 798. In this action the Reuter Organ Company sold an organ to the defendant First Methodist Church. The conditional sales contract contained an agreement on the part of the church that the church would keep the organ fully insured until the purchase price was paid in full. The contract was dated April 5, 1929. On June 1, 1938, the organ was completely destroyed by fire and thereafter the organ company brought an action against the church for failure of the church to keep the organ insured. The church defended the action contending that it had breached its agreement to insure the organ more than six years prior to the commencement of the action. At page 324 the Court, in denying the contention of the church, stated as follows:

> "Such an action is not barred by the Statute of Limitations, as the organ remained respondent's property, and was in the possession of appellant, under the contract of conditional sale, which contained a *continuing covenant* on the part of appellant to keep the organ protected by insurance." (Emphasis supplied.)

CONTINUING BREACH OF COVENANT

The Courts of the State of Washington have long recognized the doctrine of continuous breach. Starting with the case of *Doran v. Seattle,* 24 Wash. 182, 64 Pac. 230, the Court has in various circumstances recognized continuous breaches. In the Doran case, *supra,* the Court held that

where the defendant City constructed a bulkhead on the plaintiff's property which damaged the plaintiff's house, such a wrong was a continuing wrong and that the Statute of Limitations did not commence to run from the date of the construction of the bulkhead but rather continued so long as the nuisance continued.

In *Sterrett v. North Fork Mining and Smelting Company,* 30 Wash. 164, 70 Pac. 266, the Court held that the damage to the plaintiff's property by reason of fumes emitted from the defendant's mill constituted a continuing wrong and that the property owner could properly recover damages for the statutory two year period preceding the commencement of the action even though the initial wrong took place many years prior thereto. To the same effect is *Brisky v. Leavenworth Logging,* 68 Wash. 386, 123 Pac. 519.

The Courts of the State of Washington have likewise recognized continuing contracts of employment. In *Trethewey v. Green River Gorge, Inc.,* 17 Wn. (2d) 697, 136 P. (2d) 999, the Court held that where a contract of employment was for an indefinite period and the services rendered by the servant were continuous that the Statute of Limitations did not begin to run until the services were terminated.

The rule in the State of Washington likewise is that a cause of action for damages does not accrue until the damages occasioned by the wrong occur. In *Theurer v. Condon,* 34 Wn. (2d) 448, 209 P. (2d) 311, the plaintiff brought an action for damages to an apartment house owned by the

plaintiffs, which damages were caused by a fire which the plaintiffs contend was proximately caused by the defendant's negligence in installing an oil supply tank and an oil burning device. The oil burner was installed in 1937 and the fire occurred in 1944 causing the damage in question. The defendant's contended that since the action was based upon the negligent installation of the oil burner that the Statute of Limitations accrued at the time of the installation of the oil burner and that therefore the action for damages was barred. In denying the claim of the bar of the Statute of Limitations as set forth by the defendants the Court at page 454 stated as follows:

> "This Court has several times decided questions in connection with the date when a Statute of Limitations commenced to run in cases somewhat analagous to the case at bar—the bar of the Statute of Limitations as to the respondent's right of action, did not commence to run as to damages occasioned by the fire until the date of the fire, November 6, 1944."

THE STATUTE OF LIMITATIONS AS A DEFENSE

The Courts attention is called to the following Washington cases concerning the imposition of the defense of the Statute of Limitations.

In *Paul v. Kohler*, 82 Wash. 257, 144 Pac. 64, the Court stated as follows:

> "While the plea of the Statue of Limitations is not now regarded by the courts with the disfavor with which it

> was once regarded, still the courts will not indulge in any presumption in its favor. The bar must clearly appear on the face of the complaint or it must be clearly pleaded and proven by a preponderance of the evidence that the bar exists, before it will be recognized as a defense to an action."

In *Wickwire v. Reard*, 37 Wn. (2d) 748, at page 759, 226 Pac. (2d) 192, the Court stated as follows:

> "Underlying our appraisal of the issues before us is the long standing rule in this state that the Statute of Limitations, although not an unconsciouble defense is not such a meritorious defense that either the law or the facts should be strained in aid of it."

SUMMARY

From the foregoing Statement of the Case and Argument it is submitted that the facts and law establish that the promise by Harvester to Ford was a continuing promise that Harvester would not allow another Harvester farm equipment dealership to operate in Edwall, Washington in competition with Ford so long as Ford was operating the Harvester dealership in Davenport. This obligation on the part of Harvester continued from the commencement of Ford's operation in Davenport until the termination thereof. Harvester was under the same obligation on the last day of Ford's operation in Davenport as it was on the first day of operation by Ford in Davenport. During each and every day that Ford was operating the dealership in Davenport, Harvester was under the continuing obligation "not to permit a Harvester dealership to operate in Edwall." Certainly

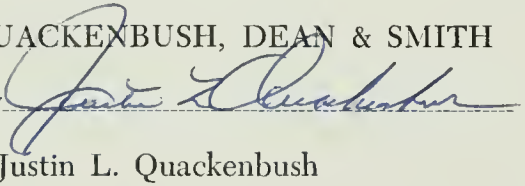
Harvester breached its agreement with Ford on the first day that it allowed St. John Hardware to operate in Edwall in competition with Ford, and likewise Harvester continued to breach its agreement with Ford on each and every day thereafter that it (Harvester) permitted St. John Hardware to operate in Edwall, Washington. As such, it is respectfully submitted that the promise and covenant by Harvester was a continuing one and that likewise Harvester continuously breached its promise to Ford so long as Harvester permitted St. John Hardware to operate in Edwall in competition with Ford. Such being the case, it is submitted that the plaintiff Ford is entitled to recover the damages as ascertained by the Court during the three years immediately preceding the commencement of the action by Ford.

CONCLUSION

The judgment in favor of International Harvester Company dismissing the Complaint of the plaintiffs, Ford, et ux, et al, should be reversed and the cause remanded to the trial court for entry of judgment in favor of Ford in the amount of damages as determined by the trial court.

Respectfully submitted,

QUACKENBUSH, DEAN & SMITH

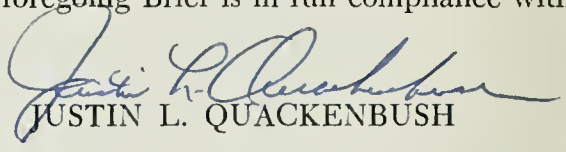
By 

Justin L. Quackenbush

Attorneys for Appellant

CERTIFICATE

I certify that, in connection with the preparation of this Brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals of the Ninth Circuit, and that, in my opinion, the foregoing Brief is in full compliance with those rules.



JUSTIN L. QUACKENBUSH

Attorneys for Appellant

APPENDIX OF EXHIBITS

Exhibit	Identified	Offered	Admit	Rej.
1-16	31	31	31	
17	56	57	57	
18	145	146	146	
101-142	31	31	31	
143	168	168	168	
144	169	169	169	
Deposition of Clyde Wells		223	224	
Deposition of Harold Berry		355	356	